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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

VICTOR TEICHER and
VICTOR TEICHER & COMPANY, L.P.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the D.C. Circuit's ruling that the Investment Advisers Act of 1940 grants the Securities and Exchange Commission sanctioning authority over unregistered investment advisers, in the face of legislation delegating such authority to the States, was erroneous.

2. Whether an administrative agency's unilateral determination that it has jurisdiction over a certain class of individuals is entitled to deference under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).

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No. _____

IN THE
UNITED STATES SUPREME COURT

October Term, 1999

VICTOR TEICHER and
VICTOR TEICHER & COMPANY, L.P.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**Petition For Writ of Certiorari To
The United States Court Of Appeals For
The District Of Columbia Circuit**

Petitioners Victor Teicher and Victor Teicher & Company, L.P. ("Teicher & Co.," collectively "Teicher Petitioners") respectfully request that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the District of Columbia Circuit, entered on June

1, 1999, which affirmed the Securities and Exchange Commission's ("SEC") May 20, 1998 order barring them from association with unregistered investment advisers.

OPINION BELOW

The decision of the Unites States Court of Appeals for the District of Columbia Circuit is published in the Federal Reporter at 177 F.3d 1016 (D.C. Cir. 1999). It is reprinted in the Appendix to this Petition, *infra*, A1. That decision affirmed a split (3-1) decision of the Securities and Exchange Commission, dated May 20, 1998, reprinted in the Appendix, *infra*, A14.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit"), of which review is sought, was entered on June 1, 1999. Petitioners' petition for rehearing and suggestion for hearing *en banc* was denied in an order dated August 5, 1999, which is reprinted in the Appendix to this Petition, *infra,* A30. The jurisdiction of this Court to review the judgment of the D.C. Circuit is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES

The Investment Advisers Act of 1940, 15 U.S.C. § 80b (the "Act" or "Advisers Act"), is the controlling federal statute in this case. The following portions of the Act are set out in the Appendix to this petition, *infra,* A32: 15 U.S.C. § 80b-2(a)(11) ("Section 202(a)(11)"); 15 U.S.C. § 80b-3 ("Section 203"); 15 U.S.C. § 80b-4 ("Section 204"); 15

U.S.C. § 80b-5 ("Section 205"); 15 U.S.C. § 80b-6 ("Section 206").

STATEMENT OF THE CASE

In enacting the Advisers Act, Congress granted the SEC the authority to regulate and sanction certain individuals who provide investment advice. It is undisputed, however, that when enacted Congress clearly intended that the authority it granted the SEC under the Act apply *only* to those investment advisers subject to the Act's registration requirements. *See* Section 203(d) (now 203(e)), *infra,* n.6. It is further undisputed that at that time, any investment adviser who was not required to register was not subject to the SEC's sanctioning authority. Since its enactment, no amendment to the Act has expanded the SEC's sanctioning jurisdiction to include those investment advisers who are exempt from the Act's registration requirements. Indeed, in 1996, Congress confirmed its intent to limit the federal regulation of smaller investment advisers by enacting legislation that returned the regulation of such advisers to the individual States in which they operate. Congress effected this change by creating a new class of individuals who -- like the Teicher Petitioners -- *are exempt from the Act's registration provisions.*[1]

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[1] Because Congress effected the removal of these investment advisers from the jurisdiction of the SEC simply by relieving them of their obligation to register, it is obvious that Congress views registration as a jurisdictional prerequisite for the SEC's assertion of jurisdiction. As the SEC and the D.C. Circuit have now ruled that Section 203(f)

Defying this clear Congressional mandate, the SEC has used Section 203 of the Act to bar the Teicher Petitioners, despite the fact that they are exempt from the Act's registration requirements. On June 1, 1999, the D.C. Circuit affirmed the SEC's actions, disregarding Congress' clearly stated intent to *reduce* the role of federal regulation of investment advisers. *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999). In so doing, the D.C. Circuit's opinion was contrary to the spirit of the Court's recent pronouncements concerning federal encroachment on State sovereignty. *See Alden v. Maine*, 119 S.Ct. 2240 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199 (1999); *Jefferson County v. Acker*, 119 S.Ct. 2069 (1999).

Section 203(a) of the Advisers Act requires that investment advisers register with the SEC. Section 203(b), for "reasons of policy," exempts certain investment advisers from this registration requirement. Section 203(e) and (f) authorizes the SEC to regulate and sanction registered investment advisors and their associated persons. It is undisputed that under Section 203(b)(3), the Teicher Petitioners are exempt from registration. Notwithstanding the fact that the Teicher Petitioners were not required to register, and ignoring Congressional intent, the D.C. Circuit

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of the Act gives the SEC jurisdiction over *all* investment advisers, irrespective of their registration status, it has effectively overruled the 1996 amendments and has returned to the SEC jurisdiction over the investment advisers that Congress explicitly assigned to the States.

determined that the term "investment adviser," as used in Section 203(f),[2] includes unregistered investment advisers. It therefore deferred to the SEC's determination that it had plenary jurisdiction to sanction those associated with unregistered advisers. Because it felt inhibited by the language of the sections in question, the D.C. Circuit disregarded the voluminous legislative history of the Advisers Act, which conclusively establishes that Congress specifically limited the application of Section 203(e) and (f) to registered advisers, and thereafter, despite a number of amendments to the Act, never altered it original design. The D.C. Circuit's opinion also misinterprets the text and structure of Section 203, which when viewed in context, establishes that Congress never intended to grant the SEC the regulatory power over unregistered advisers that it has exerted in this case.

The D.C. Circuit's ruling vastly expands and exceeds the authority granted to the SEC by Congress under Section 203(e) and (f) of the Advisers Act, misinterprets the language of the statute and ignores its pertinent and extensive legislative history. By disregarding Congress' original intent

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[2] The D.C. Circuit's opinion does not address separately the *current* scope of Section 203(e), and instead relies on the "plain language" of Section 203(f) to reach its conclusion that unregistered advisers are covered by the Act. It is impossible, however, to construe Section 203(f) without making reference to Section 203(e); the former was clearly enacted as a corollary to the latter. Accordingly, the D.C. Circuit's failure to address Section 203(e) and that subsection's overwhelming legislative history renders its opinion legally and logically dubious.

to leave unregistered investment advisers outside of the SEC's jurisdiction, it has avoided critical questions as to *when* Congress expanded the statute to include unregistered advisers, *how* it amended the statute, *why* it made such amendments, and most importantly, *why* the legislative history makes absolutely no mention of such a fundamental, substantive change in the statute.

This Court should grant this Petition in order to review the decision of the D.C. Circuit, which, in a matter of first impression, has expanded federal authority in an area in which Congress clearly intended to limit it and thus has "decided an important question of federal law that has not been, but should be, settled by [the Supreme] Court." Sup. Ct. R. 10(c).

The second issue on which the Supreme Court should grant certiorari is the D.C. Circuit's accordance of deference to the SEC's determination that it had jurisdiction over the Teicher Petitioners. The D.C. Circuit improperly deferred to the SEC's order under the principles announced in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), despite the fact the SEC was making a determination concerning its own jurisdiction. This issue is currently before the Court in *FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152, and the ruling below has contributed to a significant split in the Circuit Courts of Appeals that have considered this important federal question. *See* Sup Ct. R. 10 (a)

PROCEDURAL HISTORY

Victor Teicher began his career in the securities industry in 1976 working in the municipal finance, government bond and corporate finance departments of Salomon Brothers. In 1986, Mr. Teicher formed Teicher & Co., a limited partnership involved in the management of pools of funds on behalf of various other limited partnerships. In 1986, the SEC began an insider trading investigation of the Teicher Petitioners. In 1988, the Teicher Petitioners were indicted for this conduct and, in April 1990, were found guilty of the criminal charges against them.

On June 20, 1994, the SEC initiated the administrative proceeding that is the subject of this petition.[3] In this proceeding, the Commission sought to bar the Teicher Petitioners for life from the securities industry. The Order for Proceedings based its request for sanctions on the allegations leading to the judgment of conviction. On November 11, 1994, as a partial settlement of these proceedings, the Teicher Petitioners agreed to be barred from association with any broker-dealer, investment company, registered investment adviser and municipal securities dealer. Petitioners further agreed to stipulate that they be barred from association with any *unregistered* investment adviser, only if

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[3] In March 1991, the SEC commenced a civil proceeding against the Teicher Petitioners seeking injunctive relief. Mr. Teicher, Teicher & Co. and Carmel Partners, L.P. (a related entity) agreed to settle that proceeding by paying disgorgement, prejudgment interest and penalties, and agreeing to be enjoined from future securities law violations.

and when a final, unappealable order determined that the Advisers Act authorizes the Commission to impose such a sanction.

On February 27, 1995, an Administrative Law Judge ("ALJ") of the SEC issued an initial decision determining that the SEC has authority under Section 203(e) and (f) to sanction unregistered advisers and associated persons and determining that a bar would be appropriate as to Mr. Teicher and Teicher & Co. On May 20, 1998, more than three years later, the SEC issued a split (3-1) Opinion and Order affirming the ALJ's decision under Section 203(f). Pursuant to 15 U.S.C. § 80b-13, the Teicher Petitioners appealed this order directly to the Circuit Court of Appeals for the District of Columbia, and on June 1, 1999, the D.C. Circuit denied their petition and affirmed the SEC's order.[4]

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[4] This case was consolidated with a second proceeding brought by an individual named Ross Frankel. In its opinion, the Court reversed the SEC's bar of Frankel from associating with investment advisers on grounds that are not relevant to this petition.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO CORRECT THE D.C. CIRCUIT'S FAILURE TO RECOGNIZE CONGRESS' CLEAR INTENT TO WITHHOLD FROM THE SEC JURISDICTION TO SANCTION THOSE ASSOCIATED WITH UNREGISTERED INVESTMENT ADVISERS

In 1996, noting the breadth of the SEC's jurisdiction, Congress amended the Advisers Act by adding a new provision, Section 203A. This addition to the Act was intended to transfer jurisdiction over a large class of investment advisers from the SEC to the States in which they operate. Congress retracted the SEC's jurisdiction by creating a new class of investment advisers who although previously required to register with the SEC, would now be exempt from the Act's registrations provision and instead be subject to State registration and regulation. Congress made a clear policy statement reigning in the SEC, and did so by relieving smaller investment advisers of the duty to register with this federal regulatory body. The SEC, however, has blithely ignored Congress' effort to cede authority to the States, asserting that it has the authority to bring administrative proceedings and sanction *all* investment advisors, regardless of whether the Act exempts them from registration. In affirming the SEC's expansion of its jurisdiction, the D.C. Circuit has frustrated Congress' redesignation of Federal and State power, and has permitted it to amass more power in an area in which Congress has clearly intended to reduce federal jurisdiction. This Court should not permit the SEC and the D.C. Circuit to ignore

such clear Congressional intent and permit an unauthorized expansion of the SEC's federal power.

First, the Act's legislative history, as embodied in the nine separate Congressional reports culminating in the 1996 amendments, demonstrates that Congress never intended to expand its coverage beyond registered investment advisers. Second, the context of the Advisers Act, and in particular Section 203 (which is entitled "Registration of Investment Advisers"), shows that subsections (e) and (f) clearly apply only to registered investment advisers.

A. The D.C. Circuit and the SEC Have Ignored Determinative Legislative History Which Demonstrates That Congress Never Expanded the Scope of Section 203(e) and (F) to Include Unregistered Investment Advisers

The primary role of the Court in construing a statute is, of course, determining the intent of Congress. *Chevron*, 467 U.S. at 842-43. In cases determining whether Congress has granted an agency jurisdiction over a specific class of individuals, "the issue is correctly framed as whether Congress intended to delegate such jurisdiction to the [agency]." *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998), *cert. granted*, 119 S.Ct. 1495 (1999). "Ascertaining congressional intent is of particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction." *Id.* at 162. In this case, the level of scrutiny should be particularly intense.

The heart of the D.C. Circuit's opinion is that the "plain language" of Section 203(f),[5] primarily its failure to qualify the term investment adviser with the adjective "registered," begins and ends the inquiry as to the intent of Congress. In telescoping its analysis of the section to a few words, the Court fails to analyze the entirety of the statute, its context and, most significantly, its legislative history. The decision suggests that the Teicher Petitioners failed to present anything "adequate" to overcome the import of the statute's plain language. *Teicher*, 177 F. 3d at 1017. This statement is indeed a curious articulation in the face of the overwhelming evidence of Congressional intent supporting the Teicher position. In affirming the SEC's order, the D.C. Circuit completely ignores Congress' 1996 parsing of the SEC's jurisdiction over investment advisors in favor of the States. Furthermore, it dismisses the legislative history by

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[5] Section 203(f) states, in relevant part:

> (f) The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser if ... [such person has committed or omitted acts enumerated in subsection (e), etc.].

15 U.S.C. § 80b-3(f) (reprinted, *infra*, A42)

characterizing it as "bits not even associated with the enactment of § 203," and claiming that it does not provide "much help" to Petitioners argument. *Teicher*, 177 F.3d at 1018-19. This mischaracterization cannot withstand scrutiny; the legislative history cited by Petitioners is comprehensive, relevant, and determinative of Congress' intent. The Congressional reports interpreting the Act, to which the Teicher Petitioners cite, demonstrate Congress' understanding that Section 203(e) and (f) were limited to registered investment advisers. These reports were supplemented by submissions from the SEC itself, statements made by Senators Alphonse D'Amato and Phil Gramm, the SEC's own rules and a Report of the Task Force on SEC Settlements from *The Business Lawyer*, all of which recognized that the scope of the SEC's sanctioning authority under these sections was limited to registered investment advisers.

As noted above, the D.C. Circuit and the SEC acknowledge that, when enacted, Section 203(e) (then 203(d)) did not apply to those exempt from the Act's registration requirements.[6] *Teicher*, 177 F.3d at 1018. But neither the D.C. Circuit nor the SEC have been able to adequately address *how* and *when* Congress amended Section 203(e) of

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[6] As originally enacted, Section 203(e) (then 203(d)) stated in relevant part:

> The Commission after hearing may by order deny registration to or revoke or suspend the registration of an applicant under this section, if the Commission finds that such denial, revocation or suspension is in the public interest . . . .

the Act to include unregistered investment advisers. The D.C. Circuit did not -- and indeed could not -- point to any statements by Congress that it ever intended to expand the scope of Section 203(e) and (f) in such a manner. Given the breadth of the legislative history that accompanied each amendment to the Advisers Act and the obvious import of the 1996 amendments, it is simply "not plausible" that Congress would have engaged in such a radical expansion of the statute without making some mention of it. *Dewsnup v. Timm*, 502 U.S. 410, 420 (1992) (finding that it is "not plausible" that Congress would significantly amend a statute without mentioning it "somewhere in the [statute] itself or in the annals of Congress. . ."); *c.f., Jones v. United States*, 119 S.Ct. 1215, 1220 (1999) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so."); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370-371 (1986)

(unlikely that Congress would leave question of great importance to agency to decide).[7]

The legislative history in this case is both quantitatively and qualitatively overwhelming. In 1940, the Act was explicitly limited to "applicants" for registration. *See, infra,* n.6 In 1960, Congress extended Section 206 (the Act's antifraud provisions) to unregistered advisers, recognizing that the Act, as written, did not permit any administrative action to be taken against unregistered advisers for fraud, but only subjected them to an injunctive action for violating the provision of required registration. S. Rep. No. 1760, 86th Cong., 2d Sess. 7 (1960). At the same time Congress amended Sections 204 (the record-keeping provision) and 205 (the investment advisory contract provision) to include all investment advisers who were "required" to register with the SEC. As Congress explained, its expansion of Section 206 was expressly limited to that provision, leaving the more narrow focus of Section 203(e) (then (d)) unaffected:

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[7] Instead of pointing to any evidence of Congress' intent to expand the Advisers Act to unregistered investment advisers, the D.C. Circuit's opinion instead cites to Congress' additions of *sanctions* to Section 203(e). *Teicher*, 177 F. 3d at 1018. These additional sanctions beg the question. The mere fact that Congress has expanded the "array of sanctions" that the SEC may impose on *registered* investment advisers to include censure, suspension and "place limitations," cannot in any way be seen as an expansion of the statute to include *unregistered* investment advisers.

> This change follows the pattern now existing in the Securities Act of 1933 and the Securities Exchange Act of 1934. *In both of these statutes there are securities or persons who are exempted, for reasons of policy, from registration, and thus from the regulatory jurisdiction of the Commission . . .*

S. Rep. No. 1760, 86th Cong., 2d Sess. 7-8 (1960) (emphasis supplied). Thus, Congress continued to recognize that under Section 203(e) (then 203(d)), unregistered advisers were still outside of "the regulatory jurisdiction of the Commission." Id. at 8.

Prior to 1970, the Commission was permitted to proceed against entities that were registered investment advisers, but not against individuals associated with those advisers. In 1964, the SEC requested that Congress amend the Advisers Act so that it could proceed directly against individuals associated with *registered* investment advisers. It stated:

> Under [current] procedures ... if a person affiliated with a *registered investment adviser* violates the law, the Commission can take disciplinary action against such person only by proceeding against the adviser even if the misconduct occurred without the knowledge or approval of the adviser. . .[The Commission] recommends that a new paragraph ... be added to Section 203 of the Investment Advisers Act, which would authorize the Commission to proceed directly against a person and to censure, bar, or suspend the right of such person to be *affiliated with a registered investment adviser . . .*

SEC, Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 343-44 (1966) (emphasis supplied). There was no valid policy consideration for the SEC to limit its request for expanded power to registered investment advisers if it also had -- or sought -- authority over unregistered investment advisers. In 1970, Congress adopted the SEC's proposal and amended the Advisers Act to add Section 203(f), which allows the Commission to proceed directly against associated individuals. The Congressional Reports that accompanied the 1970 amendments recognized that Section 203(f) was to apply only to those associated with registered investment advisers. The Senate report noted that:

> [The proposed amendments] would strengthen existing disciplinary controls *over registered investment advisers* by making them more comparable to the provisions of Section 15(b) of the Securities Exchange Act. . .

S. Rep. No. 184, 91st Cong., 2d Sess. 44 (1970) (emphasis supplied). Thus, as stated by Congress, the only purpose of Section 203(f) was to bring persons associated with *registered* investment advisers within the scope of the Commission's administrative jurisdiction.[8]

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[8] The pronouncements of Congress accompanying the 1990 amendments of Section 203 further indicate that Section 203(e) and (f) was limited to registered investment advisers. Two of the new subsections, 203(k)(1) and (k)(3), were enacted in order to permit the SEC to conduct administrative proceedings to impose permanent and

The Adviser's Act was significantly amended in 1996, adding Section 203A. The manner in which Congress amended the statute again demonstrates that Congress does not view *unregistered* investment advisers as subject to the provisions of Section 203(e) and (f). As noted above, Section 203A essentially creates a new class of investment advisers who are exempt from registering with the SEC, but who are

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temporary cease-and-desist orders. While subsection (k)(1) (permanent order) enables the SEC to enter such an order against "any person," subsection (k)(3) (temporary order) is limited to "a broker, dealer, investment adviser ... or ... an associated person of, or a person seeking to become associated with, any of the foregoing." 15 U.S.C. § 80b-3(k). As in Section 203(e) and (f), although the text of Section 203(k)(3) does not include the adjective "registered" before the term investment adviser, Congress clearly intended the provision to apply only to registered advisers. The accompanying Senate report states:

> [Temporary restraining orders] may be issued by the SEC only with respect to persons or entities acting as broker-dealers, investment advisers, ... or other persons or entities *which are, or are required to be, registered with the SEC or associated with such persons*.

S. Rep. No. 337, 101st Cong., 2d Sess. 3 (1990) (emphasis supplied). In other words, Congress intended the disciplinary provisions of Section 203 to be limited to *registered* investment advisers and their associated persons, unless, as in subsection (k)(1), it specified otherwise.

instead registered with the State in which they operate. The amendment was intended to alleviate the burden on the SEC by dividing responsibility over the nation's investment advisers between the SEC and the States, granting the latter

> *exclusive* jurisdiction to register investment advisers who manage less than $25 million in client assets. . . The effect of this division of responsibility will be that *between two-thirds and three-quarters of investment advisers will be supervised by the States where they do their business*. . .

Statement of Sen. Gramm (142 Cong. Rec. S5571-01, at S5594 - 98 May 23, 1996) (emphasis supplied). Thus, when Congress sought to remove a large number of advisers from the SEC's jurisdiction, it simply relieved these entities of their obligation to register with the SEC.[9] As noted *supra*, this is

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[9] This limitation on the applicability of these sections to registered advisers was recognized by the American Bar Association's Committee on Federal Regulation of Securities, which stated that the:

> plain language and structure of Section 203, the legislative history, and certain of the SEC's own statements in proposing and adopting Rule 29 of its Rules of Practice, all lead to the conclusion that the SEC does not have the power administratively to bar an individual from being associated with an investment adviser that is not required to register under Section 203.

a clear statement from Congress that it did not intend for the SEC to have sanctioning authority over investment advisers who are not required to register with the SEC. This intent, however, has been eviscerated by the D.C. Circuit's opinion, which, in finding that the SEC has jurisdiction over *all* investment advisers, has returned to the SEC the very jurisdiction that Congress had stripped away from it.

B. The Language of the Statute Confirms That Congress Intended for Section 203(e) and (F) to Be Limited to Unregistered Investment Advisers

The D.C. Circuit's determination that the language of Section 203(e) and (f) "unambiguous[ly]" confers the SEC with jurisdiction over unregistered investment advisers also is flawed. *Teicher*, 177 F.3d at 1019.[10] By failing to address

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Report of the Task Force on SEC Settlements, 47 *The Business Lawyer* 1115 (1992).

[10] Even if the language of the statute was "plain" upon its face, the D.C. Circuit was still obliged to consult the Act's legislative history to determine whether the language of the statute is at odds with Congress' intent. *Ardestani v. INS*, 502 U.S. 129, 135-36 (1991); *Public Citizen v. Department of Justice*, 491 U.S. 440, 455 (1989); *see United States Nat'l Bk. of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"); *Conroy v.*

the context in which these provisions appear, the D.C. Circuit took an unduly narrow view of the statute and failed to consider the statutory scheme which, as a matter of policy and federalism, delegates to the States primary responsibility for regulating the smaller unregistered entities that populate the investment adviser business. As this Court stated in *Public Citizen v. Department of Justice*, 491 U.S. 440, 455 (1989):

> Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees . . . seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).

Aniskoff, 507 U.S. 511, 518 n. 12 (1993) (courts should not "enforce an unambiguous statutory text" when Congress "intended a different result"); *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) ("the phrase, 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish . . ."). Here, where the context of the statute and its legislative history so clearly evince an intent by Congress to exclude unregistered investment advisers from the SEC's jurisdiction, the D.C. Circuit's "limited mechanistic" reliance on the definition of investment adviser cannot survive scrutiny. *Brown & Williamson*, 153 F.3d at 161 (finding FDA's reliance on statutory definitions a "limited mechanistic inquiry [that was] insufficient to determine Congress' intent.").

In making its determination, the D.C. Circuit and the SEC relied heavily on the definition of "investment adviser" contained in Section 202 of the Act, which includes those who are exempt from the Act's registration requirements. *Teicher*, 177 F.3d at 1018-19. But the definition in Section 202 is expressly limited, directing that it should not be used when "the context otherwise requires." Section 202(a), 15 U.S.C. §80b-2(a). The context of Section 203(e) and (f), in which the term "investment adviser" appears, certainly suggests that Congress did not intend for Section 202's definition to apply. The inclusion of such a limitation in the statute would have been unnecessary had Congress intended the term "investment adviser" to cover all investment advisers.

Section 203 is nearly entirely focussed on registration, and is captioned "Registration of Investment Advisers." This title indicates that the terms of Section 203 are intended to apply first and foremost to registered investment advisers, and to unregistered investment advisers only when specifically indicated. However, the D.C. Circuit failed to address the Teicher Petitioners' argument concerning the caption, disregarding this Court's recognition that "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 118 S.Ct. 1219, 1226 (1998) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)). Here, the title is vital in divining Congressional intent.

Similarly, the D.C. Circuit's opinion puts too much emphasis on Congress' limitation of Sections 204 (the record keeping provisions) and 205 (relating to investment contracts) to investment advisers required to register as evidence that

the absence of such a limitation in Section 203(e) and (f) is somehow controlling. *Teicher*, 177 F.3d at 1018. As discussed *supra*, when the statute was enacted in 1940, it was plain from the face of Section 203 that it dealt only with registered investment advisers. While obviously only *registered* advisors could have their registration revoked under Section 203(e), such a limitation was not inherent in the rules regarding the maintenance of records (Section 204) or investment advisory contracts (Section 205). Accordingly, an explicit limitation to registered investment advisers -- although essential to Sections 204 and 205 -- would be needlessly redundant in Section 203(e).

The D.C. Circuit also disregarded relevant portions of the text of Section 203(e) and (f). An essential principle of statutory construction is *noscitur a sociis* ("a word is known by the company it keeps"). *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574-75 (1995). Here, subsections 203(e) and (f) list a series of possible sanctions (censure, placing limitations on, suspension, revocation or bar) that should be given related meaning. The sanctions of suspension or revocation can apply only to registered advisers. Therefore, by interpreting the section to apply to *registered* investment advisers only, the Court can avoid "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson*, 513 U.S. at 575 (citation omitted).

In sum, the D.C. Circuit has ignored inappropriately the context in which the term "investment adviser" appears, falling prey to the vice of literalism. The context of Section 203(e) and (f), in the very least, require reference to the Act's determinative legislative history. *See Steadman v. SEC*, 450

U.S. 91, 100 (1981) (where "language of the statute [was] somewhat opaque," the legislative history "clearly reveal[ed] Congress' intent"). Because its reading of the statute is plainly contrary to the intent of Congress, granting certiorari is necessary to correct the D.C. Circuit's affirmance of the SEC's departure from clearly defined Congressional policy in an attempt to amass additional power.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE D.C. CIRCUIT INAPPROPRIATELY DEFERRED TO THE SEC'S UNILATERAL DETERMINATION THAT IT HAD JURISDICTION OVER THE TEICHER PETITIONERS

Certiorari should also be granted to resolve an issue that has created a significant fracture among the Circuit Courts of Appeals -- whether a federal agency's decision concerning the scope of its own jurisdiction is due deference under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). Here, the D.C. Circuit applied such deference to the SEC's determination that Section 203(e) and (f) gave the SEC jurisdiction to conduct administrative hearings and to sanction those associated with *unregistered* investment advisers. *Teicher*, 177 F.3d at 1019. This deference contributes to a deep split in the Circuits, and is indeed a part of a case currently before the Court, *Brown & Williamson Tobacco Corp. v. FDA*, 119 S.Ct 1495 (1999) (granting certiorari).

Although review of agencies' interpretations of statutes is usually given substantial deference under *Chevron*, numerous circuit courts have recognized that such deference is inappropriate where the issue before this Court is purely

jurisdictional. As stated in *Missouri v. Andrews*, 787 F.2d 270, 286 (8th Cir. 1986), *aff'd, ESTI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), "[t]he *Chevron* rule requires deference only where an agency reasonably construes the applicable statute on a matter which is within its jurisdiction to decide. The limits of an administrative agency's statutory authority remains an issue suitable for judicial resolution." *See also Brown & Williamson* 153 F.3d at 161 ("no deference is due the [agency's] construction of the Act unless it is acting within the bounds of its congressionally-established authority"); *California Rural Legal Assistance v. Legal Services Corp.*, 937 F.2d 465, 466 (9th Cir. 1990) (Farris, J. concurring)[11] ("if there is any manner of statutory construction in which the judiciary should not defer to an administrative agency, it is in defining the parameters of the agency's authority under the statute"); *but see Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994) (finding deference applicable to agency's determination of its own jurisdiction); *Puerto Rico Maritime Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988) (same).

The Court should resolve the split that has arisen. The Court set the stage for this divergence in the Circuits in 1988 in *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 387 (1988), in which Justices Scalia and Brennan took differing views of whether deference to an agency's decision is appropriate where the agency is determining the scope of its own jurisdiction. In a concurring opinion, Justice Scalia took

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[11] The majority opinion appears at 917 F.2d 1171 (9th Cir. 1990).

the view that has been adopted by the D.C. and Third Circuits, finding that deference should be granted irrespective of the jurisdictional nature of the question presented to the Court. This view, however, was not and has not been adopted by the full Court. Justice Brennan, writing the dissent in that case, observed that the reasons for agency deference simply do not apply to jurisdictional issues, because "agencies can claim no special expertise in interpreting a statute confining its jurisdiction." *Mississippi Power*, 487 U.S. at 387 (citations omitted) (the Supreme "Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction"); *see also* Ernest Bellhorn and Paul Verkuil, *Controlling Chevron Based Delegations*, 20 Cardozo L. Rev. 989, 992-996 (arguing that the Supreme Court should restore "independent judicial determination of jurisdictional issues").

This Court now has an opportunity to address the split that has arisen from Justices Scalia and Brennan's opinions, and the current case provides ideal circumstances to do so, because the issue here is purely jurisdictional. Moreover, certiorari is especially warranted in this case, because the SEC's jurisdictional arrogation is a radical change in its position, and was made in the face of a Congressional direction to the contrary. This Court has found similar actions by agencies to be inappropriate. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself in an area which it has no jurisdiction'") (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973); *see also Brown & Williamson*, 153 F.3d at 161 (citing *Adams Fruit*).

Moreover, the fact that the Court has granted certiorari in *Brown & Williamson* demonstrates how important the issue is. *See* Stern, Gressman, Shapiro and Gellar, *Supreme Court Practice*, 7th Ed. (1993) 192-93 ("where the Petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been denied ..."). [12]

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[12] Although the issue of deference was not set forth as one of the "questions presented" by the Petitioner in *Brown & Williamson*, it is clearly an important aspect of that case. As the citations above indicate, the Fourth Circuit's refusal to grant deference to the FDA's determination was a significant part of its opinion. Furthermore, the Petitioner's argument in *Brown & Williamson* turns on its claim that its determination is entitled to *Chevron* deference:

> The Fourth Circuit suggested that an agency is entitled to diminished deference when it attempts "to expand the scope of its jurisdiction." As long as an agency is reasonably interpreting a statutory provision it enforces, however, *Chevron* deference applies. It is not relevant whether the agency's proposed interpretation can be said to affect its jurisdiction.

Petitioner's Brief, 1999 WL 503874 (July 12, 1999) at *17 n.3; See also Id. at *34, *39, *42 (arguing that Petitioner's determination entitled to *Chevron* deference).

CONCLUSION

Congress determined over fifty years ago, when the Advisers Act was first promulgated, that the Commission could regulate through administrative proceedings registered investment advisers only. Later it expanded the scope of administrative proceedings to include persons associated with registered advisers. Later still it made cease-and-desist proceedings available to the Commission against unregistered persons. But for valid policy reasons sounding in federalism, Congress has gone no further and specifically has not authorized the Commission to bring an administrative proceeding against entities exempt from the Advisers Act's registration requirements, and those individuals associated with them.

If the SEC believes that injunctive and cease-and-desist proceedings against unregistered advisers are inadequate, it can seek authority from Congress to expand its powers, but it is not the role of a court to permit it to assume Congressional authority by reading into the Advisers Act sanctions and remedies for which the legislators did not provide. Congress is the appropriate institution to determine policy questions as to the breadth and balance of regulation necessary for the protection of the investing public. If this Court does not grant this petition, Congress' intent will be judicially usurped, and a whole class of investment advisers -- including those specifically excluded from the SEC's jurisdiction by the 1996 amendments to the Advisors Act -- will now unjustifiably find themselves subject to SEC administrative proceedings and sanctions. Finally, failure to grant the Petition will result in the unwarranted expansion of *Chevron* deference to agency decisions that have nothing to do

with their expertise, but with the *expansion* of their power, a role best served by the courts.

* * *

For these and all of the foregoing reasons, Petitioners Victor Teicher and Teicher & Co. respectfully request this Court to grant their petition for a writ of certiorari. Alternatively, if the Court does not grant certiorari, the Teicher Petitioners respectfully request that the Court hold its ruling in this case without taking any action until after it decides *Brown & Williamson*.

Dated: November 3, 1999

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 30, 1999 **Decided June 1, 1999**

No. 98-1287

Victor Teicher, et al.,
Petitioners

v.

Securities and Exchange Commission,
Respondent

Consolidated with 98-1414

On Petitions for Review of an Order of the Securities and Exchange Commission

Robert G. Morvillo argued the cause for petitioners Victor Teicher and Victor Teicher & Co. With him on the briefs were Catherine M. Foti and Neil M. Barofsky. Diana D. Parker entered an appearance.

Roger J. Bernstein argued the cause and filed the briefs for petitioner Ross S. Frankel. Eugene A. Gaer entered an appearance.

David M. Becker, Deputy General Counsel, Securities & Exchange Commission, argued the cause for respondent. With him on the brief were Jacob H. Stillman, Solicitor, and Susan S. McDonald, Senior Litigation Counsel.

Before: Silberman, Williams and Tatel, Circuit Judges.

Opinion for the Court filed by Circuit Judge Williams.

Williams, Circuit Judge: Petitioners Victor Teicher and Ross Frankel were convicted of various charges of securities fraud, conspiracy and mail fraud for their participation in an insider trading scheme. In a later administrative proceeding, the Securities and Exchange Commission issued an order barring both petitioners from various branches of the securities industry, including association with registered and unregistered investment advisers. (Victor Teicher & Co. was also convicted and barred along with the individual; we refer to both simply as Teicher.) Both petitioners now challenge portions of the order as beyond the Commission's statutory authority. Teicher argues that the Commission's authority under Section 203(f) of the Investment Advisers Act of 1940 (the "Advisers Act"), 15 U.S.C. § 80b-3(f), did not include the power to exclude him from association with an unregistered investment adviser; the language of the statute is emphatically against the claim, and Teicher presents nothing adequate to overcome that language, assuming anything could be adequate. Frankel claims that § 15(b)(6) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78o(b)(6), which is triggered by a person's past, present or future association with a broker-dealer, does not supply the Commission with authority to exclude persons from the investment adviser industry; indeed, the logic of the statutory structure convinces us that Congress withheld that power.

* * *

Section 203(f) of the Advisers Act provides in part:

> The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds ..., that such censure, placing of limitations, suspension, or bar is in the public interest and that such person [has been convicted of specified offenses, including those of which Teicher was convicted].

U.S.C. § 80b-3(f)(emphasis added).

Some but not all investment advisers are required by the Act to register with the Commission. Among the exempt advisers, for example, would be one with fewer than 15 clients and not holding itself out to the public as an investment adviser nor acting as adviser to an investment company under the Investment Company Act of 1940. Section 203(b), 15 U.S.C. § 80b-3(b). The term "investment adviser" in Section 203(f) is unmodified, and the SEC read it to include any investment adviser, whether registered or not. Teicher says the term covers only a registered investment adviser. Since he was not associated with a registered investment adviser at the time of his wrongdoing or at the time of the Commission's administrative proceeding, he says that Section 203(f) afforded it no authority to sanction him.

No language in the cited provision remotely suggests that its application is limited to "registered" investment advisers. And the Act explicitly defines an investment adviser as "any person who, for compensation, engages in the business of advising others ... as to the advisability of investing in, purchasing, or selling securities." § 202(a)(11) of the Investment Advisers Act, 15 U.S.C. s 80b-2(a)(11). Again, no mention of registration. As the Act in various places specifies "registered" advisers, see, e.g., §§ 203(d) & 208, 15 U.S.C. §§ 80b-3(d) & 80b-8, and in others those "exempt[ ] from registration," see §§ 204 & 205, 15 U.S.C. §§ 80b-4 & 80b-5, there seems every reason to believe that when it uses the term unmodified, it means both.

Teicher claims that our decision in Wallach v. SEC, 202 F.2d 462 (D.C. Cir. 1953), construed the phrase "any broker or dealer" in an analogous provision in the Exchange Act to encompass only "registered" brokers or dealers; thus, he argues, § 203(f) in the Advisers Act should be similarly limited to "registered" investment advisers. In reality Wallach is a good deal narrower. There the SEC tried to force the joinder of a broker-dealer's employee-salesman as a party in disciplinary proceedings against the broker-dealer. We rejected the Commission's argument that the statute, which in terms focused on brokers and dealers, would reach their employees. The Commission's theory was simply that such an expanded proceeding would be much more practical--its findings would be res judicata as to the salesman as well as the firm, to be used against the salesman if he ever sought registration. See 202 F.2d at 109-10. The Commission did not argue that a salesman with a broker-dealer was an "unregistered" broker or dealer. (Such a theory seems unlikely to have been helpful for the SEC's claim, as the statute authorized only the denial or

revocation of registration as a broker or dealer, and was thus necessarily limited to a person or firm seeking or already holding such a license.)[1] Here, the Act establishes some rules applying to unregistered investment advisers, some applying to registered ones, and some, such as § 203(f), that give every appearance of applying to both. The Commission's reading honors that structure.

Teicher calls our attention to the fact that when originally enacted in 1940 § 203 applied only to registered investment advisers--in the sense that it provided only for the denial, revocation or suspension of a registration as an investment adviser. See 15 U.S.C. § 80b-3(d) (1940). But since 1940 Congress has amended the Act and expanded the array of sanctions far beyond the early focus on registration. Now the SEC's sanction power--even looking only at that granted by § 203(f)--explicitly covers persons merely associated with or seeking association with investment advisers and ranges from censure to an outright ban on association with an investment adviser.

Teicher quotes an item from the legislative history of the 1970 amendment that added s 203(f): "[The proposed amendments] would strengthen existing disciplinary controls over registered investment advisers by making them more comparable to the provisions of Section 15(b) of the Securities Exchange Act relating to broker-dealers in securities." S. Rep.

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[1] By means of a later amendment Congress explicitly granted the SEC authority to discipline persons "associated" with a broker or dealer. See s 15(b)(6) of the Exchange Act, 15 U.S.C. s 78o(b)(6).

No. 91-184, at 44 (1969) (emphasis added). But such a use of the adjective "registered" in a Senate report is not of much help, especially when the statute itself offers no apparent ambiguity that the reference might help resolve. See Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994). And the SEC has pointed to references in the same Senate Report that describe the addition with no mention of "registered." See S. Rep. No. 91-184, at 46-47; see also H.R. Rep. No. 91-1382, at 41 (1970) (same). Teicher points to several other items of legislative history, bits not even associated with the enactment of s 203, but they are even less convincing. Reviewing the Commission's statutory interpretation under the principles of Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 836 (1984), we find that Teicher has not effectively challenged the Commission's reading of the Act's unambiguous language.

* * *

Frankel's claim rests on the scope of a phrase that could be very broad--out of context. It appears in the following section, under which he was sanctioned:

> With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer ... the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar such person from being associated with a broker or dealer, ... if the Commission finds ... that such person [has been

> convicted of securities fraud or enjoined against conduct in violation of the securities laws].

§ 15(b)(6) of the Exchange Act, 15 U.S.C. § 78o(b)(6)(A) (emphasis added). The SEC's implicit reading is that this section authorizes it to "place," on any person guilty of the specified substantive violations, any "limitation[]" it chooses on his participation in any of the branches of the securities industry for which it administers an occupational licensing regime.

Frankel focuses primarily on two objections to the SEC's reading. First, he points out that the word "limitation" ordinarily has a meaning quite distinct from that of "bar." Second, the passage shows a quite intentional progression of penalty from mild to severe--censure, limitation, suspension, and finally bar; the SEC's interpretation flouts this progression, elevating "place limitations" to a scope broader than the climax penalty, "bar," which is explicitly limited to association with a broker-dealer. We need not decide whether these arguments alone would carry the day for Frankel; the SEC's interpretation also suffers fatal structural difficulties. Clearly the "place limitations" language requires some concept of the relevant domain. Even the Commission doesn't suggest that the phrase allows it to bar one of the offending parties from being a retail shoe salesman, or to exclude him from the Borough of Manhattan.

In the opinion in which the Commission initiated its claim to effect a "collateral bar" under § 15(b)(6), i.e., a bar outside the broker-dealer branch of the securities industry, Meyer Blinder, 65 CCH SEC Docket 1378, 1380-82 (1997), it relied on a general principle favoring "flexibl[e]" construction of the securities laws to effectuate their remedial purposes, id. at

1381 (citing Central Bank of Denver, N.A. v. First Interstate Bank, 511 U.S. 164, 185-86 (1994)), and three specific points that we address below--(1) that the "collateral bar" concept enables it to do in one proceeding what would otherwise require two; (2) that it prevents the risk of a regulatory "gap" through which a miscreant could for a time participate in the securities market unbeknownst to the Commission; and (3) that legislative history of a later-enacted provision shows that the Commission's reading of the statute is in accord with congressional intent. See Blinder, 65 CCH SEC Docket at 1381-83. Neither in its brief nor in Blinder did the agency articulate an explicit limiting principle other than the idea of a bar of the offender from engaging in "activities in other securities professions." See Blinder, 65 CCH SEC Docket at 1383; Government Br. at 45-46. But such a reading, if lawful, would allow the Commission to bar Frankel from becoming a commercial banker or a mergers-and-acquisitions attorney, activities linked to the securities industry but not under the Commission's jurisdiction. Because of the Commission's regulatory "gap" claim, however, we infer that it is only seriously claiming that the "place limitations" power enables it to bar an offender from a branch of the securities industry from which it might later have explicit authority to exclude him. Even this claim, however, turns out to contradict the way in which Congress has structured the relevant occupational license regimes and related sanctions.

The SEC administers three systems of occupational licensing. The Advisers Act, as we saw when considering Teicher, covers investment advisers and associated persons. §§ 203(e) & (f), 15 U.S.C. §§ 80b-3(e) & (f). The Exchange Act, under which it acted against Frankel, covers broker-dealers and associated persons. §§ 15(b)(4) & (6), 15 U.S.C. §§ 78o(b)(4)

& (6). And another section of the Exchange Act covers municipal securities dealers and associated persons. §§ 15B(c)(2) & (4), 15 U.S.C. §§ 78o-4(c)(2) & (4). In each regime, there is, as to associated persons, an almost identically worded threshold nexus requirement. Thus, recall that the sentence governing Frankel began:

> With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer ... the Commission, by order, shall....

§ 15(b)(6) of the Exchange Act, 15 U.S.C. § 78o(b)(6)(A). The one used against Teicher also demands a nexus, but the required link is to investment advisers:

> The Commission, by order shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser....

§ 203(f), Advisers Act, 15 U.S.C. § 80b-3(f). The provision for municipal securities dealers follows precisely the structure of the investment adviser provision, replacing "investment adviser" with "municipal securities dealer." § 15B(c)(4), 15 U.S.C. § 78o-4(c)(4). And each provision has the "place limitations" language in dispute here.

The SEC believes that once the threshold requirement of any of the particular provisions has been satisfied, it should be able to use the "place limitations" language to move

seamlessly from one licensing regime to another, imposing unlimited sanctions throughout all the branches of the industry within its bailiwick. Thus, once it found Frankel met the threshold requirement of being associated with a broker or dealer under the Exchange Act, it could bar him from association with any investment adviser--a sanction that is only specifically available under the Advisers Act.

In a letter submitted after oral argument, the SEC says, in response to the suggestion that its reading of the provisions virtually eliminates the nexus requirement, that such a view begs the question--which is the meaning of the "place limitations" phrase. Of course in a way that is true. But Congress's thrice repeated use of a nexus requirement focused on a single branch of the industry seems to us to underscore a congressional determination to create separate sets of sanctions, each triggered by an individual's satisfying the industry-specific nexus.

The SEC objects that this forces it to do in two proceedings what it would be more convenient to do in one. First we note that as we read the statutes, they simply do not permit the Commission to impose sanctions in any specific branch until it can show the nexus matching that branch. The Commission's real objection is thus that it must wait--perhaps indefinitely. But this does not seem especially vexing. Rather, it seems entirely consonant with Congress's having set up three separate systems for denying the benefits of "association" with licensed entities in the several systems. The provisions lead in the aggregate to a tailoring of sanctions fitted either to a looming menace (the person's being in or seeking to get into a branch of the industry), or to a malfeasance committed while in a branch.

The Commission identifies one respect in which a branch- by-branch reading of the statutes might create a risk to investors. While the Commission would get notice automatically if Frankel sought to become associated with a registered investment adviser, see Rule 204-1(b)(1), 17 CFR § 275.204-1(b)(1), and thus could start a proceeding under § 203(f), it would get no such alert for his association with an unregistered investment adviser. But assuming the Commission cannot remedy this by an equivalent notice provision for such advisers, that gap can only be because Congress withheld the authority--presumably for good reason, perhaps relating to their limited scale or regulation by other jurisdictions. A congressional discount of a peril is hardly the strongest argument why we should see it as urgent.

The SEC further points to the legislative history of the 1987 amendments, adding the "place limitations" language to the sanction provision for municipal security dealers, and thus making it fully parallel to that for investment advisers and broker-dealers. The Senate Report accompanying the change says:

> The Commission regards this as a desirable change in the law because the limitations authority is an important recognition by Congress of the need for flexibility to fashion sanctions that fit the offense and situation presented. For example, the Commission may use its "limitations" authority in the broker-dealer area to suspend the operation of a single branch office, rather than an entire firm, where misconduct was localized; or to confine an offending employee to nonsupervisory positions where an outright bar or suspension is unnecessary; or to bar persons formerly associated with

> broker-dealers from entering other securities professions where they might continue to perpetrate frauds upon unsuspecting investors.

S. Rep. No. 100-105, at 25 (1987) (emphasis added). The passage offers several examples of options indisputably added by insertion of the "place limitations" phrase, but, as the SEC argues, it appears to presuppose the Commission's broad understanding. And "post-enactment legislative history," purporting to describe an earlier enactment (or, as here, language paralleling an earlier provision), may sometimes be relevant in establishing ambiguity in the phrase commented upon. See McCreary v. Offner, __ F.3d __, No. 98-5155, 1999 WL 202475 at *6-*7 (D.C. Cir. Apr. 13, 1999). But cf. United States ex rel. Long v. SCS Business & Technical Institute, Inc., Nos. 98-5133, 98-5149 and 98-5150, 1999 WL 178713 at *6 (D.C. Cir. April 2, 1999) (declaring post-enactment legislative history as having "only marginal, if any, value."). At most, then, all the legislative history can do is to buttress the Commission's claim that the "place limitations" language is ambiguous, and thus its interpretation is entitled to Chevron deference if it is reasonable and consistent with the statutory purpose. See Troy Corp. v. Browner, 120 F.3d 277, 285 (D.C. Cir. 1997) (citing Chevron, 467 U.S. at 843). But even assuming ambiguity, we do not see the criterion of reasonableness satisfied here. "The meaning of statutory language, plain or not, depends on context." Bailey v. United States, 516 U.S. 137, 145 (1995) (citations omitted). The context--a rather elaborate structure of separate provisions with distinct threshold requirements--suggests that Congress meant the SEC would make those threshold findings before administering the corresponding sanction.

* * *

We affirm the SEC's order barring Teicher from associating with any investment adviser, registered or unregistered, but find the order in excess of the Commission's powers insofar as it purports to bar Frankel from becoming associated with an investment adviser.

So ordered.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 40010 / May 20, 1998

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 1722 / May 20, 1998

Admin. Proc. File No. 3-8394

In the Matter of	:
	:
VICTOR TEICHER	:
VICTOR TEICHER & CO., L.P.	:
New York, New York	:
	:
ROSS S. FRANKEL	:
5 Seymour Place East	:
Armonk, New York	:
	:

OPINION OF THE COMMISSION

BROKER-DEALER AND INVESTMENT ADVISER PROCEEDINGS

Jurisdiction

The Commission is authorized under Section 203(f) of the Investment Advisers Act to bring proceedings against and sanction persons associated with unregistered investment advisers.

Grounds for Remedial Action

Criminal Convictions
Injunction

The partner of an unregistered investment adviser and the vice president of a registered broker-dealer were convicted, among other things, of securities fraud. The vice president was also enjoined and convicted of perjury and obstruction of justice in connection with a Commission investigation. Held, it is in the public interest to bar partner from association with any unregistered investment adviser, and to impose a collateral bar on vice president barring him from association with any investment adviser, registered or unregistered.

APPEARANCES:

Robert G. Morvillo, Catherine M. Foti, and John T. Hecht, of Morvillo, Abramowitz, Grand, Jason & Silberberg, P.C., for Victor Teicher and Victor Teicher & Co., L.P.

Roger J. Bernstein, for Ross S. Frankel.

Richard H. Walker, Carmen J. Lawrence, Edwin H. Nordlinger, Robert B. Blackburn, and Dorothy Heyl, for the Commission's Division of Enforcement.

Appeal filed: March 13, 1995
Briefing completed: February 12, 1998
Oral argument: March 16, 1998

I.

Victor Teicher & Co., L.P. ("Teicher Co."), an unregistered investment adviser exempt from registration under the Investment Advisers Act ("Act"), [1] and Victor Teicher, its sole general partner and 75% owner, appeal from the decision of an administrative law judge. Our Division of Enforcement also appeals from that decision with respect to Ross S. Frankel, who was a vice president of Drexel Burnham Lambert, Inc., formerly a registered broker-dealer.

Based on the criminal convictions of Teicher Co. and Teicher ("the Teicher respondents") and their stipulation,[2] the law judge barred them from association with any broker, dealer, investment company, investment adviser (both registered and unregistered), and municipal securities dealer. On review, the

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[1] See Section 203(b) of the Act. Although the parties agree on Teicher Co.'s exempt status, the record does not disclose the precise basis for its exemption.

[2] The Teicher respondents agreed to be barred from association with any broker, dealer, investment company, registered investment adviser, or municipal securities dealer.

Teicher respondents object only to that portion of the law judge's order that bars them from association with an unregistered investment adviser. They contend that we lack authority under the Act to bring administrative proceedings against and sanction unregistered advisers and their associated persons.

On the basis of Frankel's criminal convictions, an injunction against him, and his consent,[3] the law judge barred Frankel from association with any broker, dealer, investment company, municipal securities dealer, member of a national securities exchange or member of a registered securities association. However, the law judge denied the Division's request to bar Frankel from association with any investment adviser. Proceedings against Frankel having been instituted solely under the Securities Exchange Act ("Exchange Act"), the law judge concluded that he had no authority to impose an advisory bar on Frankel. Frankel did not appeal from the law judge's decision. However, the Division has appealed from the law judge's refusal to issue a collateral advisory bar against Frankel.

II.

From December 1985 to March 1986, Michael David, an associate in the corporate department of Paul, Weiss, Rifkind, Wharton & Garrison, a New York law firm, provided

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[3] In his answer to the order for proceedings herein, Frankel expressed his willingness to be barred from association with any broker, dealer, investment company, or municipal securities dealer.

Teicher and Robert Salsbury, a Drexel research analyst, with confidential information concerning possible acquisitions by Paul Weiss clients. In addition, Salsbury provided Teicher with the names of companies on Drexel's "phantom list," a highly confidential list of companies that were the subject of mergers or takeovers by Drexel clients. Frankel was Salsbury's supervisor at Drexel. Salsbury passed on to Frankel confidential information that Salsbury received from David.

On April 6, 1990, a jury convicted the Teicher respondents and Frankel of securities fraud for trading on the basis of material, non-public information that they knew had been misappropriated. The three respondents were also convicted of conspiracy, the Teicher respondents of fraud in connection with a tender offer, and Teicher and Frankel of mail fraud. In addition, as a result of giving false testimony in our investigation and destroying pertinent documents, Frankel was convicted of perjury and obstruction of justice.[4] On May 18, 1994, in an action brought by this Commission, Frankel was permanently enjoined, with his consent, from further violations

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[4] Teicher Co. was fined $600,000; Teicher was sentenced to 18 months' imprisonment, placed on probation for five years, and fined $200,000; and Frankel was sentenced to 18 months' imprisonment and fined $10,000. United States v. Victor Teicher & Company, L.P., et al., 88 Cr. 796 (CSH) (S.D.N.Y.). The convictions were affirmed on appeal. United States v. Teicher, 987 F.2d 112 (2d Cir.), cert. denied, 114 S. Ct. 467 (1993).

of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.[5]

III.

A. Teicher respondents

We turn first to the proceedings against Teicher. Section 203(f) of the Act provides in relevant part as follows:

> The Commission, by order, shall censure or place limitations on the activities of any person associated, ... or, at the time of the alleged misconduct, associated ... with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission [makes the necessary findings after notice and opportunity for hearing.]

Section 202(a)(11) of the Act defines "investment adviser" as "any person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." Section 202(a)(17) defines "person associated with an investment adviser" to include "any partner ... of such investment adviser." It is undisputed that Teicher Co. falls

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[5] Frankel was ordered to disgorge his insider trading profits, and to pay prejudgment interest on that amount and a civil penalty under the Insider Trading Sanctions Act. *SEC v. Teicher*, et al., 91 Civ. 1634 (MP) (S.D.N.Y.).

within the Act's definition of investment adviser, and that Teicher was and is a person associated with that firm.

Despite the clarity of the statutory language and the total absence of any ambiguity, respondents insist that Section 203(f) authorizes this Commission to take action only against persons associated with registered investment advisers. We see no basis for that interpretation. Nor is it consistent with proper canons of statutory construction. As the Supreme Court has made clear:

> [I]n interpreting a statute, a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there .... When the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete.[6]

There is no basis for expanding Teicher Co.'s exemption from registration requirements into an exemption of its associated persons from Section 203(f). When Congress chose to exclude exempt advisers from the reach of some of the Act's provisions, it enacted specific language to that effect, as in Section 204 (dealing with required records and reports) and Section 205 (regulating the content of advisory contracts). No such language was inserted into Section 203(f).[7] Respondents also

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[6] Connecticut National Bank v. Germain, 503 U.S. 249, 253-254 (1992).

[7] As the Supreme Court has stated, "Where Congress includes particular language in one section of a statute but

point to the fact that Section 203 of the Act is entitled "Registration of Investment Advisers." However, "the title of a statute and the heading of a section cannot limit the plain meaning of the text."[8]

We have dealt with the jurisdictional issue raised by the Teicher respondents before. In prior proceedings under Section 203(f) against persons associated with unregistered advisers, we came to the same conclusion that we reach here; namely, that we have the authority to discipline such persons.[9] We have also determined that we have authority under the analogous provision of the Exchange Act, Section 15(b)(6), to discipline persons associated with unregistered broker- dealers.[10] We see no reason to depart from our prior determinations.

Respondents argue that the legislative history of Section 203(f) shows that Congress intended to limit that provision to persons associated with registered advisers.

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omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. U.S., U.S. 16, 23 (1983).

[8] Brotherhood of Railroad Trainmen v. Baltimore and Ohio Railroad Co., 331 U.S. 519, 528-529 (1947).

[9] See Dan King Brainard, 47 S.E.C. 991, 1000 n. 28 (1983); Alexander V. Stein, Investment Advisers Act Release No. 1497 (June 8, 1995), 59 SEC Docket 1493, 1497.

[10] John Kilpatrick, 48 S.E.C. 481, 487 (1986).

However, the Supreme Court has stated that where, as here, the statutory language is clear and unambiguous, even "contrary indications in the statute's legislative history" will not be allowed to alter the plain meaning of the text.[11] Indeed, "only the most extraordinary showing of contrary intentions [by Congress] [can] justify a limitation on the plain meaning of the statutory language."[12] We find no such showing here. While the House and Senate Reports on Section 203(f) speak in one place of strengthening disciplinary controls over registered investment advisers,[13] they state in another that this Commission is being given authority to bar or suspend individuals "from associating with an investment adviser," without any indication that our authority is limited to registered advisers.[14] We further note that "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history."[15]

It is well established that an investment adviser is a fiduciary whose actions must be governed by the highest

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[11] Ratzlaf v. U.S., 510 U.S. 135, 147-148 (1994). See also Barnhill v. Johnson, 503 U.S. 393, 401 (1982).

[12] Garcia v. U.S., 469 U.S. 70, 75 (1984).

[13] H.R. Rep. No. 1382, 91st Cong., 2d Sess. 13 (1970); S. Rep. No. 184, 91st Cong., 1st Sess. 44 (1969).

[14] H.R. Rep. No. 1382, supra, at 41; S. Rep. No. 184, supra, at 6-47.

[15] Pittston Coal Group v. Sebben, 488 U.S. 105, 115 (1988).

standards of conduct.[16] In light of the extremely serious misconduct in which Teicher engaged, we consider that the public interest requires that he be barred from association with any unregistered investment adviser. Since we have determined to bar Teicher, and it appears that Teicher Co. is merely Teicher's alter ego, we need not address the issues raised with respect to Teicher Co. under Section 203(e) of the Act.

B. Frankel

As noted above, the proceedings against Frankel were instituted solely under Section 15(b) of the Exchange Act. Frankel, who was associated only with a broker-dealer, argues that we do not have authority under that Act to impose a collateral sanction barring him from association with an investment adviser, registered or unregistered.

We recently dealt with the issue of whether we have authority to impose a collateral bar under Section 15(b). After careful and extensive consideration, we determined that we do possess that authority.[17] Moreover, we determined that, if a collateral advisory bar is imposed, it will effectively prevent

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[16] See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-192 (1963); Rosenfeld v. Black, 445 F.2d 1337, 1342-1344 (2d Cir. 1971).

[17] Meyer Blinder, Securities Exchange Act Release No. 39180 (October 1, 1997), 65 SEC Docket 1970, 1974-1981. Commissioner Hunt dissented from the conclusion that this Commission has the authority to impose collateral sanctions.

both registered and unregistered advisory activities.[18] We see no reason to revisit these conclusions, and we reaffirm them.

Frankel argues that the imposition of a collateral bar would deny him due process since the order for proceedings herein did not give him notice that such a bar was at issue. However, even if an administrative pleading is defective, the defect can be remedied if the record demonstrates that the respondent was given notice of the matter in question and afforded a sufficient opportunity to respond.[19] Here, at the very outset of hearings in this matter, Division counsel stated that our staff was seeking an "industry-wide" bar against Frankel. And Frankel's counsel responded with the same arguments regarding our asserted lack of authority that he is now making to us. Thus, Frankel was clearly given sufficient notice of the collateral bar issue.

Frankel further contends that, even assuming we have the authority to impose a collateral advisory bar, we should not impose one on him. He asserts, among other things, that his participation in the Teicher conspiracy was limited to a single security, that he has already been sufficiently punished for his misconduct, that no showing has been made that he engaged in any wrongdoing with respect to a customer or breached a fiduciary duty, and that he has had an unblemished record since 1986.

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[18] Id., 65 SEC Docket at 1978-1979.

[19] See Aloha Airlines, Inc. v. CAB, 598 F.2d 250, 261-262 (D.C. Cir. 1979), and the authorities therein cited.

We have stated that, in determining whether to impose a collateral bar, we must consider "whether the misconduct is of the type that, by its nature, `flows across' various securities professions and poses a risk of harm to the investing public in any such profession." We further stated that we must also consider whether the egregiousness of the misconduct shows the need for such a bar in order to protect the public.[20]

We conclude that Frankel's misconduct warrants the imposition of a collateral bar. The law judge summed up the pertinent circumstances as follows:

> The conduct of ... Frankel was particularly egregious .... He not only facilitated the theft of confidential material from a law firm but, when discovered, ... destroyed evidence, lied under oath, and otherwise obstructed justice in an attempt to escape liability.... [Frankel] acted with the highest degree of scienter .... [D]uring the hearing, he offered no firm assurances that he would not commit future violations, although he was given a number of opportunities to offer such assurances.

We have already pointed out that an investment adviser is a fiduciary who must act in accordance with the highest standards of behavior. We consider that Frankel's egregious misconduct demonstrated ethical lapses that disqualify him from assuming any post involving fiduciary responsibilities. In our view, an advisory bar is necessary to protect the investing public from the risk of harm at Frankel's hands. The public interest

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[20] Meyer Blinder, supra, 65 SEC Docket at 1981.

requires that he be barred from association with any investment adviser, registered or unregistered.[21]

An appropriate order will issue.[22]

By the Commission (Chairman LEVITT and Commissioners JOHNSON and UNGER); Commissioner HUNT dissenting in part and Commissioner CAREY not participating.

Jonathan G. Katz
Secretary

Commissioner HUNT, dissenting in part:

For the very most part, I join my colleagues in this fine opinion. But because I believe that the Commission and its staff

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[21] The Division's motion to withdraw its request for oral argument and to file a supplemental brief is granted. That brief and Frankel's reply memorandum are made part of the record herein. All of the contentions advanced by the parties have been considered. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

[22] Since the parties sought review only with respect to certain determinations made by the law judge, our order shall give the requisite notice that the remainder of the law judge's decision has become the final decision of this Commission.

may not seek "collateral" suspensions or bars in litigated matters, and should not seek them in settled matters, I dissent from this particular aspect of the bars imposed against Messrs. Frankel and Teicher. See Meyer Blinder, Securities Exchange Act Release No. 39180 (October 1, 1997), 65 SEC Docket 1970, 1982-1989 (Commissioner Hunt, dissenting).

UNITED STATES OF AMERICA
before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel No. 40010 / May 20, 1998

INVESTMENT ADVISERS ACT OF 1940
Rel No. 1722 / May 20, 1998

Admin. Proc. File No. 3-8394

In the Matter of	:
	:
VICTOR TEICHER	:
VICTOR TEICHER & CO., L.P.	:
New York, New York	:
	:
ROSS S. FRANKEL	:
5 Seymour Place East	:
Armonk, New York	:
	:

ORDER IMPOSING REMEDIAL SANCTIONS AND NOTICE OF FINALITY

On the basis of the Commission's opinion issued this day, it is

ORDERED that Victor Teicher be, and he hereby is, barred from association with any unregistered investment adviser; and it is further

ORDERED that Ross S. Frankel be, and he hereby is, barred from association with any investment adviser, registered or unregistered.

No appeal was taken with respect to the remainder of the administrative law judge's initial decision, and the Commission did not choose to review the decision on its own initiative. Accordingly, notice is hereby given, pursuant to Rule 360(e) of the Commission's Rules of Practice, that the remainder of the law judge's decision has become the final decision of the Commission. The order contained in that decision (1) barring Victor Teicher and Victor Teicher & Co., L.P. from association with any broker, dealer, registered investment adviser, municipal securities dealer or investment company and (2) barring Ross S. Frankel from association with any broker, dealer, municipal securities dealer, investment company, member of a national securities exchange or member of a registered securities association is hereby declared effective.

By the Commission.

Jonathan G. Katz
Secretary

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1287 **September Term, 1998**

Victor Teicher and Victor Teicher & Company, L.P.,
Petitioners

v.

Securities and Exchange Commission
Respondents

Consolidated with 98-1414

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judge Wald did not participate in this matter.

Filed: August 5, 1999

Statutes and Regulations

§80B-2 Definitions

(a) When used in this title, unless the context indicates otherwise requires, the following definitions shall apply

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities, but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956, which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher or any bona fide newspapers, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States had a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the

Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

§ 80B-3. Registration of investment advisers

(a) Necessity of registration

Except as provided in subsection (b) of this section and section 80b-3a of this title, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

(b) Investment advisers who need not be registered

The provisions of subsection (a) of this section shall not apply to --

(1) any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies;

(3) any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out

generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under subchapter I of this chapter, or a company which has elected to be a business development company pursuant to section 80a-53 of this title and has not withdrawn its election. For purposes of determining the number of clients of an investment adviser under this paragraph, no shareholder, partner, or beneficial owner of a business development company, as defined in this subchapter, shall be deemed to be a client of such investment adviser unless such person is a client of such investment adviser separate and apart from his status as a shareholder, partner, or beneficial owner;

(4) any investment adviser that is a charitable organization, as defined in section 3(c)(10)(D) of the Investment company Act of 1940 [15 U.S.C.A. 80a-3(c)(10)(D)], or is a trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties which such organization, whose advice, analyses, or reports are provided only to one or more of the following:

(A) any such charitable organization

(B) a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C.A. § 80-3(c) (10)(B)]; or

(C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.D.A. 80a-3(c)(10)(B)], or the trustees, administrators,

settlors (or potential settlors), or beneficiaries of any such trust or other instrument; or

(5) any plan described in section 414(e) of Title 26, any person or entity eligible to establish and maintain such a plan under Title 26, or any trustee, director, officer, or employee of or volunteer for any such plan or person, if such person or entity, acting in such capacity, provides investment advise exclusively to, or with respect to, any plan, person, or entity or any company, account, or fund that is excluded from the definition of an investment company under section 80a-3(c)(14) of this title.

(c) Procedure for registration; filing of application; effective date of registration; amendment of registration

(1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar function or, if such an

investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser, consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents) the Commission shall --

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes it reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied and the applicant is not prohibited from registering as an investment advisor under section 80b-3 of the title. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

(d) Other acts prohibited by subchapter

Any provision of this subchapter (other than subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce are used in connection therewith shall also

prohibit any such act, practice, or course of business by any investment adviser registered pursuant to this section or any person acting on behalf of such an investment adviser, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(e) Censure, denial or suspension of registration; notice and hearing

The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated --

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds --

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, government securities broker, government securities dealer, fiduciary, transfer agent, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act [7 U.S.C.A. 1 et seq.] or any substantially equivalent statute or regulation;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18, or a violation of substantially equivalent foreign statute.

(3) has been convicted during the 10-year period preceding the date of filing of any application for registration, or at anytime thereafter, of --

(A) any crime that is punishable by imprisonment for 1 or more years, and that is not described in paragraph (2); or

(B) a substantially equivalent crime by a foreign court of competent jurisdiction.

(4) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction, including any foreign court of competent jurisdiction, from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act [7 U.S.C.A. § 1 et seq.] or any substantially equivalent statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(5) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C.A. § 78a et seq.], the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], this subchapter, the Commodity Exchange Act [7 U.S.C.A. § 1 et seq.], or the rules or regulation under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(6) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C.A. § 78a et seq.], the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], this subchapter, the Commodity Exchange Act [7 U.S.C.A. § 1 et seq.], the rules or

regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph (5) no person shall be deemed to have failed reasonably to supervise any person, if --

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(7) is subject to an order of the Commission entered pursuant to subsection (f) of this section barring or suspending the right of such person to be associated with an investment adviser which order is in effect with respect to such person.

(8) has been found by a foreign financial regulatory authority to have --

(A) made or caused to be made in any application for registration or report required to be filed with a foreign securities authority, or in any proceeding before a foreign securities authority with respect to registration, any statement that was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to a foreign securities authority any material fact that is required to be stated therein;

(B) violated any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade;

(C) aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery treaded on or subject to the rules of a contract market of any board of trade, or has been found, by the foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of statutory provisions, and rules and regulations promulgated thereunder, another person who commits such a violation, if such other person is subject to his supervision.

(f) Bar or suspension from association with investment adviser; notice and hearing

The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (5), (6), or (8) of subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or

practice specified in paragraph (4) subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

(g) Registration of successor to business of investment adviser

Any successor to the business of an investment adviser registered under this section shall be deemed likewise registered hereunder, if within thirty days from its succession to such business it shall file an application for registration under this section, unless and until the Commission, pursuant to subsection (c) or subsection (e) of this section, shall deny registration to or revoke or suspend the registration of such successor.

(h) Withdrawal of registration

Any person registered under this section may, upon such terms and conditions as the Commission finds necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any person registered under this section, or who has pending an application for registration filed under this section, is no longer in existence, is not engaged in business as an investment adviser or is prohibited from registering as an investment adviser under section 80b-3a of the title, the Commission shall by order cancel the registration of such person.

(i) Money penalties in administrative proceedings

(1) Authority of commission

In any proceeding instituted pursuant to subsection (e) or (f) of this section against any person, the Commission may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such person --

(A) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C.A. § 78a et seq.], the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], or this subchapter, or the rules or regulations thereunder;

(B) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

(C) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which was required to be stated therein; or

(D) has failed reasonably to supervise, within the meaning of subsection (e)(6) of this section, with a view to preventing violations of the provisions of this subchapter and the rules and regulations thereunder, another person who commits such a violation, if such other person is subject to his supervision;

and that such penalty is in the public interest.

(2) Maximum amount of penalty

(A) First tier

The maximum amount of penalty for each act or omission described in paragraph (1) shall be $5,000 for a natural person or $50,000 for any other person.

(B) Second tier

Notwithstanding subparagraph (A), the maximum amount of penalty for each such act or omission shall be $50,000 for a natural person or $250,000 for any other person if the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the maximum amount of penalty for each act or omission shall be $100,000 for a natural person or $500,000 for any other person if --

(i) the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(ii) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(3) Determination of public interest

In considering under this section whether a penalty is in the public interest, the Commission may consider --

(A) whether the act of omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;

(B) the harm to other persons resulting either directly or indirectly from such act or omission;

(C) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior.

(D) whether such person previously has been found by the Commission, another appropriate regulatory agency, or self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in subsection (e)(2) of this section;

(E) the need to deter such person and other persons from committing such acts or omissions; and

(F) such other matters as justice may require.

(4) Evidence concerning ability to pay

In any proceeding in which the Commission may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidenced may

relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

(j) Authority to enter order requiring accounting and disgorgement

In any proceeding in which the Commission may impose a penalty under this section, the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(k) Cease-and-desist proceedings

(1) Authority of Commission

If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this subchapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation,

require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(2) Hearing

The notice instituting proceedings pursuant to paragraph (1) shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or later date is set by the Commission with the consent of any respondent so served.

(3) Temporary order

(A) In general

Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to paragraph (1), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of the proceedings, the Commission may enter a temporary order requiring the Respondent to cease and desist from the violation or threatened violation and to take

such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest as the Commission deems appropriate pending completion of such proceedings. Such an order shall be entered only after notice and opportunity for a hearing, unless the Commission, notwithstanding section 80b-11(c) of this title, determines that notice and hearing prior to entry would be impracticable or contrary to the public interest. A temporary order shall become effective upon service upon the respondent and, unless set aside, limited, or suspended by the Commission or a court of competent jurisdiction, shall remain effective and enforceable pending the completion of the proceedings.

(B) Applicability

This paragraph shall apply only to a respondent that acts, or, at the time of the alleged misconduct acted, as a broker, dealer, investment adviser, investment company, municipal securities dealer, government securities broker, government securities dealer, or transfer agent, or is, or was at the time of the alleged misconduct, an associated person of, or a person seeking to become associated with, any of the foregoing.

(4) Review of temporary orders

(A) Commission review

At any time after the respondent has been served with a temporary cease-and-desist order

pursuant to paragraph (3), the respondent may apply to the Commission to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application and the Commission shall hold a hearing and render a decision on such application at the earliest possible time.

(B) Judicial review

Within -

(i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or

(ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,

the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.

(C) No automatic stay of temporary order

The commencement of proceedings under subparagraph (B) of this paragraph shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(D) Exclusive review

Section 80b-13 of this title shall not apply to a temporary order entered pursuant to this section.

(5) Authority to enter order requiring accounting and disgorgement

In any cease-and-desist proceeding under paragraph (1), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, period of accrual, and such other matters as it deems appropriate to implement this subsection.

§ 80b-3a. State and Federal responsibilities

(a) Advisers subject to State authorities

(1) In general

No investment adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business shall register under section 80b-3 of this title, unless the investment adviser --

(A) has assets under management of not less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this subchapter; or

(B) is an adviser to an investment company registered under subchapter I of this chapter.

(2) Definition

For purposes of this subsection, the term "assets under management" means the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services.

(b) Advisers subject to Commission authority

(1) In general

No law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person --

(A) that is registered under section 80b-3 of this title as an investment adviser, or that is a supervised person of such person, except that a State may license, register, or otherwise qualify any investment adviser representative who has a place of business located within that State; or

(B) that is not registered under section 80b-3 of this title because that person is excepted from the definition of an investment adviser under section 80b-2(a)(11) of this title.

(2) Limitation

Nothing in this subsection shall prohibit the securities commission (or any agency or office performing like functions) of any state from investigating and bringing enforcement actions with respect to fraud or deceit against an investment adviser or person associated with an investment adviser.

(c) Exemptions

Notwithstanding subsection (a) of this section, the Commission, by rule or regulation upon its own motion, or by order upon application, may permit the registration with the Commission of any person or class of persons to which the application of subsection (a) of this section would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of this section.

(d) Filing depositories

The Commission may, by rule, require an investment adviser --

(1) to file with the Commission any fee, application, report, or notice required by this subchapter or by the rules issued under this subchapter through any entity designated by the Commission for that purpose; and

(2) to pay the reasonable costs associated with such filing.

(e) State assistance

Upon request of the securities commissioner (or any agency or officer performing like functions) of any State, the Commission may provide such training, technical assistance, or

other reasonable assistance in connection with the regulation of investment advisers by the State.

§ 80b-4. Reports by investment advisers

Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser other than one specifically exempted from registration pursuant to section 80b-3(b) of this title), shall make and keep for prescribed periods such records (as defined in section 78c(a)(37) of this title), furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. All records (as so defined) of such investment advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

§ 80b-5. Investment advisory contracts

(a) Compensation, assignment, and partnership-membership provisions

No investment adviser, unless exempt from registration pursuant to section 80b-3(b) of this title, shall make use of the mails or any means of instrumentality of interstate commerce, directly or indirectly, to enter into, extend, or renew any investment advisory contract, or in any way to perform any investment advisory contract entered into, extended, or renewed on or after November 1, 1940, if such contract --

(1) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(3) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

(b) Compensation prohibition inapplicable to certain compensation computations

Paragraph (1) of subsection (a) of this section shall not--

(1) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date;

(2) apply to an investment advisory contract with --

(A) an investment company registered under subchapter I of this chapter, or

(B) any other person (except a trust, governmental plan, collective trust fund, or separate account referred to in section 80a-3(c)(11) of this title), provided that the contract relates to the investment of assets in excess of $1 million,

if the contract provides for compensation based on the asset value of the company or fund under management averaged over a specified period and increasing and decreasing proportionately with the investment performance of the company or fund over a specified period in relation to the investment record of an appropriate index of securities prices or such other measure of investment performance as the Commission by rule, regulation, or order may specify; or

(3) apply with respect to any investment advisory contract between an investment adviser and a business development company, as defined in this subchapter, if (A) the compensation provided for in such contract does not exceed 20 per centum of the realized capital gains upon the funds of the business development company over a specified period or as of definite dates, computed net of all realized capital losses and unrealized capital depreciation, and the condition of section 80a-60(a)(3)(B)(iii) of this title is satisfied, and (B) the business development company does not have outstanding any option, warrant, or right issued pursuant to section 80a-60(a)(3)(B) of this title and does not have a profit-sharing plan described in section 80(a)-56(n) of this title;

(4) apply to an investment advisory contract with a company excepted from the definition of an investment company under section 80a-3(c)(7) of this title; or

(5) apply to an investment advisory contract with a person who is not a resident of the United States.

(c) Measurement of changes in compensation

For purposes of paragraph (2) of subsection (b) of this section, the point from which increases and decreases in compensation are measured shall be the fee which is paid or earned when the investment performance of such company or fund is equivalent to that of the index or other measure of performance, and an index of securities prices shall be deemed appropriate unless the Commission by order shall determine otherwise.

(d) "Investment advisory contract" defined

As used in paragraphs (2) and (3) of subsection (a) of this section, "investment advisory contract" means any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person other than an investment company registered under subchapter I of this chapter.

(e) Exempt persons and transactions

The Commission, by rule or regulation, upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from subsection (a)(1) of this section, if and to the extent that the exemption relates to an investment advisory contract with any person that the Commission determines does not need the protections of subsection (a)(1) of this section, on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser, and such other

factors as the Commission determines are consistent with this section.

§ 80b-6. Prohibited transactions by investment advisers

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly --

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. the prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.